No. 83-103

In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION, GEORGIA KRAFT CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE, MID-CONTINENT SMALL BUSINESS UNITED, AND GULF AND GREAT PLAINS LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amicus Mid-Continent Small Business United, a not-for-profit organization, has a strong interest in the outcome of this case. The organization represents small businesses in a four-state area including Iowa, Kansas, Nebraska, and Missouri and is affiliated with Small Business United which is a national organization. Approximately

five hundred small businesses constitute the membership of Mid-Continent Small Business United. The purpose of the organization is to provide a means for its members to speak with a unified voice in support of the free enterprise system. The member small businesses have a strong concern for protecting management and labor from criminal activity, as well as ensuring that the National Labor Relations Act is not construed to protect otherwise criminal activity.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the preservation of the free enterprise system, the protection of the liberties and constitutional rights of citizens, and a rational system of criminal justice. The Foundation has appeared as amicus curiae in a number of cases before this Court, including cases relating to labor law.

SUMMARY OF ARGUMENT

The narrow question now facing this Court is whether it is proper under the Labor Management Relations Act (29 U.S.C.A. § 141 et seq. (West, 1973)), for a company to discharge two union employees on strike who visited the home of a third non-striking employee at night and threatened the non-striking employee in front of his child and pregnant wife.

Mid-Continent Small Business United and Gulf and Great Plains Legal Foundation are strongly opposed to this Court placing its stamp of approval on conduct of this nature. Violence has played no small part in the continuing struggle between labor and management. Legal reports from the American labor scene present depressing evidence of how economic conflicts between labor unions and management have too often degenerated into acts of physical force and coercion.

Conduct such as that described by the facts of this case was never intended to be protected by the creators of the Labor Management Relations Act. Conduct of that nature was considered reprehensible by the legislators who adopted this statute and its construction must not be stretched to protect from discharge those who utter such threatening statements.

The conduct of the two striking employees in this case is deplorable. Conduct that is threatening in nature not only to the non-striking employee but to his family violates the sanctity of the home and must not be tolerated.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT AND THE LABOR MANAGEMENT RELATIONS ACT CLEARLY DEMONSTRATES THAT THESE STATUTES WERE ENACTED TO REDUCE INDUSTRIAL STRIFE AND WERE IN NO WAY INTENDED TO PROTECT VIOLENCE OR THREATS THEREOF.

Prior to the passage of the National Labor Relations Act (29 U.S.C.A. §§ 157-166 (West, 1973)), the American labor scene was plagued by acts of violence perpetrated by, or in the name of, labor unions. *See* Haggard, *Labor Union Violence As an Unfair Labor Practice,* 34 S.C. L. Rev. 273 (1972). In an attempt to resolve the strife between labor and management, Congress responded with the passage of the National Labor Relations Act, often referred to as the Wagner Act after its principal author. This Act codified many of the rights asserted by labor and proscribed employer interference with those rights. There were no corresponding union unfair labor practices.

Although the express purpose of the National Labor Relations Act was to end strikes and other forms of industrial strife (National Labor Relations Act, Public Law No. 74-198, 49 Stat. 449 § 1 (1935)), that purpose was not fully served by the legislation. The number and intensity of strikes continued as before. The Bureau of Labor Statistics' work stoppage figures fail to show any significant decline in either the average duration or percentage of workers involved in the ten year period following passage of the National Labor Relations Act.

The number and intensity of confrontations in 1945 and 1946 led to a growing public sentiment that perhaps

too much power had been granted the unions by the National Labor Relations Act and that a similar legal constraint on unions would be necessary to restore a proper balance and insure some degree of industrial order. During the years 1936 through 1944, the average number of workers involved in work stoppages was 4.0% whereas the average percentage during 1945-46 more than doubled to 9.3%. U.S. Dept. of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 508 (1978). In 1947, Congress enacted the Labor Management Relations Act (LMRA), also referred to as the Taft-Hartley Act. This Act amended the National Labor Relations Act in several aspects. Most importantly for this discussion, the LMRA enumerated a list of *union unfair labor practices.* In that Act, Congress expressed the concern over the many reported instances of actual physical violence *and intimidation* that labor union supporters had directed against both employers and employees not sympathetic to the union cause. *See* Labor Management Relations Act, Ch. 120, Pub. L. No. 101 (1947) (codified at 29 U.S.C.A. §§ 141-187 (West, 1973)); *see also* Legislative History of the Labor Management Relations Act of 1947, at 456, 882, 898, 905, 912, 1025, 1207-08 [hereinafter cited as Legis. Hist. LMRA].

The House Committee report on an early version of what was to eventually become the Labor Management Relations Act succinctly expresses the Congressmen's concern for labor union violence against employees and employers alike:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American working man has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act . . . .

> The employer's plight has likewise not been happy . . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees . . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism. *Id.* at 295-296.

The original House version of the Labor Management Relations Act made it an unfair labor practice for any employee, "by intimidating practices" to interfere with the Section 7 rights of other employees. Legis. Hist. LMRA at 52. In addition, the original House version made it an unfair labor practice for a union to "interfere with, restrain, or coerce individuals in the exercise of rights guaranteed in Section 7(b)." *Id.* at 52-53. The section defining "unlawful concerted activities" specifically described the kinds of conduct which those who created the statute intended to prohibit:

> By the use of force or violence *or threats thereof*, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, *or threats thereof*, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or *besetting the home of any individual* in connection with any labor dispute. *Id.* at 78. (emphasis added).

Earlier discussions of this legislation in the Senate as well clearly demonstrate that violence and threats thereof were condemned by this legislation. Four members of the Senate committee which introduced the bill stated in their Supplemental Views attached to the Senate Report, that "[t]he Committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families . . . ." *Id.* at 456. Accordingly, a floor amendment was introduced adding provisions similar to the House version of this bill, making it an unfair labor practice for a labor organization "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7." *Id.* at 1018.

The debate on this floor amendment was extensive and is important for this discussion. Among other things, the proponents of this amendment gave some specific examples of the kinds of union conduct they intended to prohibit. The use or threatened use of ordinary physical violence as a means of forcing employees to support the union was frequently cited as an evil to which the amendment was directed. One Senator referred to a letter from a small employer in New York who stated that on several occasions gangs of union men were sent into his plant. They pushed his employees around and threatened them if they did not join the union. *Id.* at 1018. The Senator also referred to a case where the union "threatened, jostled, and beat up one of the employees as he was going to work." *Id.* at 1019. There are many other references to threats, physical violence, and "goon squad" tactics spread throughout the debates. *Id.* at 1020, 1024, 1025, 1028, 1031.

Out of this debate came the Congressional response to this problem of union violence. First, union violence against employees was made an unfair labor practice.

Section 7 of the Taft-Hartley Act was expanded to include a right to *refrain* from union activities, and Section 8(b)(1)(A) was added to prohibit unions from restraining or coercing employees in the exercise of that right. This change was made, perhaps exclusively, for the purpose of outlawing "mass picketing and the use of violence in the conduct of a strike." 93 Cong. Record 6540 (1947) (statement of Rep. Hartley); *Id.* at 4563 (statement of Sen. Taft); *Id.* at 6548 (statement of Rep. Halleck). Furthermore, Congress had a very broad concept of violence in mind when it enacted this statute. The legislative history clearly shows that this section of the Act was intended to include threats. As Senator Taft stated in reference to the Labor Management Relations Act then pending before Congress:

> "I can see nothing in the pending measure which .... would in some way outlaw strikes. *It would outlaw threats against employees.* It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. *All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.*" 93 Cong. Rec. 4563 (1947) *reprinted in* Legis. Hist. LMRA at 1207. (emphasis added). *See also* 93 Cong. Rec. 4142 (1947).

Not only were threats included in this concept of "violence" but various kinds of picket line harassment and abuse were also included. S. Rep. No. 105, 80th Cong., First Sess. 50 (1947); Legis. Hist. LMRA at 456.

Equally clear is the fact that Congress intended to bind unions and individual members thereof to the same definition of "unfair labor practices" as was already in

effect for management. In referring to the Labor Management Relations Act then pending before Congress, Senator Taft remarked:

> "This amendment proposes to say that it shall also be an unfair labor practice for an employee organization, a union or its agents, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> The language is perfectly clear . . . . [An employer] cannot go to an employee and threaten physical violence . . . . Now it is proposed that the union be bound in the same way. What could be more reasonable than that?" 93 Cong. Rec. 4135 (1947), *reprinted in* Legis. Hist. LMRA p. 1025.

In emphasizing the intention to bind employers and unions to the same rules, Senator Taft went on to state:

> "Why should a union be able to go to an employee and threaten violence if he does not join the union? . . . What possible distinction can there be between an unfair labor practice of that kind on the part of an employer and a similar practice on the part of a union? . . . We know that men have been threatened. There have been many cases in which unions have threatened men or their wives . . . . It seems to me perfectly clear that that is a reprehensible practice, and one which is just as reprehensible and just as limiting on the rights of the employees guaranteed by the Wagner Act as would be an unfair labor practice on the part of employers." *Id.*

The legislative history repeatedly makes it clear that "any employees participating in these activities may certainly be discharged for cause and are not entitled to reinstatement." 93 Cong. Rec. at 7495. *See also* H.R. Rep.

No. 510, 93rd Cong., Second Sess. 40, 42 (1947), *reprinted in* Legis. Hist. LMRA, 544, 546, and (1947) U. S. Code Cong. and Ad. News, 1135, 1164-65.

Congress responded to the problem of labor violence in a second way—by curtailing the National Labor Relations Board's power to order reinstatement. The House version of what was to become the Taft-Hartley Act specifically exempted from the protections of Section 7 all conduct "constituting unfair labor practices under Section 8(b), unlawful concerted activities under Section 12, or violations of collective bargaining agreements." H.R. 3020, 80th Cong., 1st Sess. 19 (1947), *reprinted in* Legis. Hist. LMRA at 176. Section 12, defined unlawful concerted activities as "the use of force or violence *or threats thereof*" in connection with strikes and picketing. H.R. Rep. No. 510, 93rd Cong. Second Sess. 47 (1947), *reprinted in* Legis. Hist. LMRA at 204-05. (emphasis added).

As it passed the House, Section 10(c) of the bill was amended to curtail the Board's power to order reinstatement. This section stated that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause". H.R. 3020, 80th Cong., 1st Sess. 19 (1947), *reprinted in* Legis. Hist. LMRA at 196. The House Report noted that "[t]he change made in Section 10(e) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. 245, 80th Cong., 1st Sess. (1947)

at 42, *reprinted in* Legis. Hist. LMRA at 333. (emphasis added). Obviously, the authors of the House Report felt that all such activity was more than adequate grounds for discharge.

The legislative history of the Labor Management Relations Act is clear. Threats of physical violence are not protected concerted activities. The legislative history speaks for itself. Employees who engage in such reprehensible conduct and who are discharged because of it are not entitled to reinstatement.

II. THE STANDARD ADOPTED BY THE THIRD CIRCUIT IN McQUAIDE AND THE FIRST CIRCUIT IN ASSOCIATED GROCERS OF NEW ENGLAND IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT IN REFUSING TO PROTECT THREATS OF PHYSICAL VIOLENCE FROM UNIONS OR UNION MEMBERS AS WELL AS FROM MANAGEMENT AND SHOULD BE ACCEPTED AS THE PROPER STANDARD OF REVIEW BY THIS COURT.

Section 7 of the Labor Management Relations Act gives employees "the right to assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .*" (29 U.S.C.A. § 157 (West, 1973)). (emphasis added).

On its face, the language of Section 7 would seem broad enough to cover nearly any kind of employee activity, "from the peaceful submission of grievances to blowing up the plant." Haggard, *Picket Line and Strike Violence as Grounds for Discharge*, 18 Hous. L. Rev. 423

(March 1981). However, through reading the legislative history and examining the cases construing this Act, it becomes obvious that not all conduct which satisfies the literal words of the statute is necessarily "protected" against every type of employer response. "[B]oth the Board and the courts have recognized that not every form of activity that falls within the letter of this provision is protected." *Elk Lumber Co.*, 91 N.L.R.B. 333, 336-37 (1950).

The present controversy pertains to the use of threats made at night by striking employees at the home of a non-striking employee. The question as to whether conduct of this nature is sanctioned by § 7 of the National Labor Relations Act was most recently answered by the United States Court of Appeals for the Third Circuit. In *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977), the court was faced with a similar set of circumstances as that in the case at bar. The facts of *McQuaide* indicate that a striking employee threatened non-striking employees several times. This conduct resulted in the discharge of the striking employee. On one occasion a non-striking delivery employee was warned by the striker that he would "get him." The striker later threatened to "knock the god-d .. .. n s .. .. .. out of [a non-striking truck driver]" and told yet another driver "Scab, you're going to get yours." *Id.* at 528. In attempting to protect the striker from discharge, the NLRB stated that threats of violence without some overt act of physical violence were insufficient to sustain discharge of the employee.

In denying reinstatement to the discharged striker, the Third Circuit expressly rejected the NLRB's "overt acts" requirement. The court noted that "threats are not protected conduct under the Act, and we fail to see how a

threat acquires protected status simply because it is unaccompanied by physical acts or gestures." *Id.* at 527.

The Court adopted "an objective standard to determine whether conduct constitutes a threat sufficiently egregious to justify an employer's refusal to reinstate," *Id.*, namely "'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" *Id.* at 528, quoting *Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850, 852 (3rd Cir. 1964), *cert. denied*, 379 U.S. 826 (1964).

The standard set out in *McQuaide* for individual strike participants was simply the same standard previously used by the Third Circuit in determining whether conduct by a *union* rose to the level of restraint or coercion in violation of Section 8(b)(1)(A). This approach is consistent with the legislative history of the Labor Management Relations Act. Coercive conduct which would be an unfair labor practice for management or a union to engage in is also to be considered unprotected insofar as the individual participants are concerned.

There is little doubt that the NLRB would have found it to be an unfair labor practice if, on the facts of this case, a member of management rather than an individual union member had visited the home of a striking employee and threatened him. Why then is there a refusal to apply the same rules to the individual union member? This refusal is a clear violation of the purpose for which the Labor Management Relations Act was intended.

In addition to the Third Circuit, the First Circuit has applied the rules pertaining to unfair labor practices with equal force to unions, individual union members and management alike. In *Associated Grocers of New England v.*

NLRB, strikers whose reinstatement was at issue had threatened the lives of three job applicants. 562 F.2d 1333 (1st Cir. 1977). At least one of the three construed the threat as a serious threat on his life and did not apply for work. Following the approach of *McQuaide*, the Court of Appeals again rejected the Board's "overt acts" test and found that in the circumstances of the case, the conduct and words would reasonably tend to coerce or intimidate, and that they were therefore unprotected. *Id.* at 1337.

By reviewing the legislative history, it is obvious that the Congressmen who enacted the Labor Management Relations Act did not intend to lend protection to threatening statements uttered to coerce employees into joining union activities. Even the NLRB has determined that threatening statements uttered in a violent context leave the speaker unprotected from unfair labor practice charges. The following is a representative sampling of statements that have been found to restrain or coerce:

> "While no heads were broken last time . . . things could be different now." *United Sugar Workers Union Local 9 (American Sugar Co.)*, 146 N.L.R.B. 154, 159 (1964).
>
> "I hate to think what would happen if you walked in there." *United Furniture Workers Local 309 (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886, 906 (1949).
>
> "You better not try it [cross the picket line] or there will be trouble." *Id.* at 900.
>
> "There may be trouble later." *United Mine Workers (Union Supply Co.)*, 90 N.L.R.B. 436, 438 (1950).
>
> "Lay off the union business or your ulcers will be bothering you." *Checker Taxi Co.*, 131 N.L.R.B. 611, 620 (1961), *enforced in part*, 99 L.L.R.M. 2903 (D.C. Cir. 1978).

"We'll get you." *Street Employees (Plymouth & Brockton Street Railway Co.)*, 142 N.L.R.B. 174, 179 (1963).

"We'll take care of you." *Id.*

"We'll get you sooner or later." *Perry Norvell Co.*, 80 N.L.R.B. 225, 238 (1948).

"We'll fix her so she won't work permanently." *Amalgamated Meat Cutters (Iowa Beef Processors, Inc.)*, 233 N.L.R.B. 839, 843 (1977).

By comparison the threats presently at issue to the non-striking employee that he was "screwing them out of their godd .. .. n money by working during the strike" and that they would "take care of " the non-striker, seem merely to be statements to add to the list of threats above which were determined to be coercive and intimidating. Indeed the words "We'll take care of you" have already been found to be sufficiently threatening and coercive to warrant the finding of an unfair labor practice. *Street Employees (Plymouth & Brockton Street Railway Co.)*, 142 N.L.R.B. 174, 179 (1963).

The facts of the present case are such that the threats took on an extra aura of intimidation. First, the threats were made on the doorstep of the non-striking employee's home. Most cases dealing with threats have arisen on the picket line. Second, the threats were issued at night. The bulk of cases concerning threats have dealt with threats issued in daylight hours. Third, the threats came from not one, but two employees. Fourth, the striking employees were intoxicated. Fifth, the threats were made in the presence of the non-striker's child and pregnant wife. The issuance of a threat is a serious matter when only the parties to the dispute are present. The threat takes on

decidedly sinister tones when issued in the presence of innocent third party family members.

It is impossible to assume that the drafters of the National Labor Relations Act or the Labor-Management Relations Act intended to provide affirmative protection to acts of coercion and intimidation as set forth in the facts of this case. It cannot be assumed that conduct of this nature should be protected even when committed in connection with an otherwise legitimate strike.

It is beyond comprehension that the National Labor Relations Board and a federal appellate court would stand in defense of threatening conduct which makes a man and his family feel unsafe in their own home. This is especially true when the only issue is whether the employer may terminate his working and financial relationship with those who engage in intimidating and coercive tactics.

Despite protestations of the Board that their decision should not be construed as condoning even minor forms of coercion or violence, their actions speak louder than their words. It cannot be denied that the order reinstating the workers has a legitimizing effect on strike violence. There is reason for grave concern that eventually threats of this nature will be considered an acceptable method by which striking employees may gain support for their cause.

To avoid these results, this Court must strongly reaffirm the liberty of the employer to terminate employees who engage in threatening and intimidating strike tactics.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, and thereby affirm the discharge of the striking employees.

Respectfully submitted,

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